9. Sensible Intervention.

It is most important that the Commission administer the Act's mandates on universal service sensibly in accordance with the Act's mandates, with a view to the real best interests of telecommunications customers, including both residential consumers and business customers, and not in excess of its jurisdiction. As Commissioner Ness recognized, the Commission's task "is to construct a new universal service regime that makes subsidies more explicit, more targeted, more efficient, and more compatible with competition, . . ."[31]

Throughout the Commission's process of implementing the Act, the Commission's overriding goal should be to maximize consumer welfare by encouraging competition and innovation. A large measure of that can be accomplished through appropriate deregulation, as the Act promises. There is no doubt that competition is the major force which spurs both innovation and low cost for consumers. In contrast, regulation engenders sluggish innovation and does little to promote low cost for consumers.

The DCA urges the Commission to vigorously apply Congress' clear mandate, at every point, and to exercise a bias in favor of an open, competitive telecommunications market, rather than an intrusively regulatory one.

III. COMMENTS ON SPECIFIC JOINT BOARD RECOMMENDATIONS.

A. Universal Service Principles.

The Joint Board recommends that the Commission adopt one additional universal service principle -- "competitive neutrality."

> COMPETITIVE NEUTRALITY -- Universal service support mechanisms and rules should be applied in a competitively

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[31] Separate Statement of Commissioner Susan Ness (hereinafter "Separate Statement of Ness"), November 7, 1996, at p. 1. Emphasis added.

neutral manner.[32]

The DCA agrees with that recommendation. However, when considering whether proposed universal service support mechanisms and rules are competitively neutral, the DCA urges the Commission to broaden the scope of "competitive neutrality" as it often is defined.

Competitors often define competitive neutrality as something which creates a "level playing field". As anyone who has been to a tourist "mystery spot" knows, what is level can be a matter of perception. What appears level to one group of competitors may appear unlevel to another group of competitors.

In the Commission's Number Portability proceeding, the Commission identified two principles with which it tentatively concluded any competitively neutral cost recovery mechanism should comply:

> (1) a competitively neutral cost recovery mechanism should not give one service provider an appreciable incremental cost advantage over another service provider, when competing for a specific subscriber; and (2) a competitively neutral cost recovery mechanism should not have a disparate effect on the ability of competing service providers to earn a normal return.[33]

In its comments to the Commission's request for further comments, the DCA urged the Commission to view "competitive neutrality" from a consumer, rather than an industry, perspective. The DCA asserted that "consumer competitive neutrality" means that: (1) all customers of all providers share equally in supporting, in this case, universal service; and, (2) no customer of any provider can avoid paying his or her share of that support, or reduce

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[32] Recommended Decision, at ¶ 23.

[33] In the Matter of Telephone Number Portability, CC Docket No. 95-116, Request for Further Comments on Cost Recovery of Telephone Number Portability, at ¶ 210.

his or her share of that support, by changing providers.

The DCA urges the Commission to apply the same focus in this proceeding when analyzing whether any aspect of the federal universal service program is competitively neutral.

B. Limiting Universal Service Support to a Single Primary Residential Connection.

The Joint Board recommends limiting universal service support to one connection per principal residence.[34] The DCA supports that recommendation, as far as it goes, but is concerned that customers could easily circumvent that limitation by listing their telephone at a second home in the name of a household member different from the person named as head of the primary household.

More important, the DCA believes that the limitation does not go far enough to narrow the scope of universal service funding to those in economic need who would not remain connected to the network without assistance.

The Joint Board concludes that:

> [T]he consumer benefits that result from support should not be extended to second homes, which may not be occupied at all times. There is no evidence that the additional cost of supporting second or vacation residences is justified in light of the presumption that owners of these residences can afford to pay rates that accurately reflect the carrier's costs to provide services carried on connections to second residences.[35]

The DCA questions how the Commission could justify providing universal service support to the primary residence of customers who can afford a second or vacation home. If those customers can afford to pay rates that accurately reflect the carrier's cost to provide

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[34] Recommended Decision, at ¶ 89.

[35] Recommended Decision, at ¶ 90.

services to their second residences, should they not also be able to afford to pay rates that accurately reflect the carrier's costs to provide services to their primary residence? Can it be reasonably argued that any rates to a consumer who owns more than one home for his or her own exclusive use must be subsidized in order to be "reasonable", "just" and "affordable" within the meaning of the Act?

As stated above, the DCA is very concerned that the universal service fund will balloon out of proportion to any justification for a universal service program. A major potential cause of that burgeoning increase may be the subsidization of service to residents who do not need any economic help in order to stay connected to the network, and who can well afford to pay for the cost to provide their telecommunications service. Subsidizing those customers also reduces the potential to provide greater subsidies to those in economic need, and to schools, libraries and rural health care providers.

The DCA believes that, in establishing a universal service program which will operate in a competitive marketplace, the FCC should focus on establishing a program which will infringe on the competitive market as little as possible, and which is narrowly focused to provide a subsidy only where one is truly economically essential. In that way, the FCC can help assure that the federal universal service program accomplishes its intended purpose -- assuring the opportunity to be connected to the network to those who otherwise would not have the opportunity to do so -- while minimizing the burden both on all other consumers, and on the competitive marketplace.

C. Subsidization of Internal Wiring.

The DCA recognizes that in order to have advanced telecommunications and information services available in classrooms, classrooms first must be properly wired to

support those services. Lack of adequate internal wiring sufficient to support those services, as well as lack of equipment and training needed to make good use them, may preclude many schools from taking full advantage of the discounts for advanced telecommunications and information services that will be made available pursuant to the Act. It is a serious problem, and one which must be adequately addressed.

Nonetheless, no matter how compelling the reason, the fact remains that the Commission does not have jurisdiction over inside wiring or customer premises equipment ("CPE"), and nothing in the Act bestows on the Commission that power. As Commissioner Chong stated:

> Although most telecommunications services continue to be regulated at the state and local level, internal connections have been unregulated for a number of years and the market for such connections is highly competitive. The provision of deep discounts for these unregulated facilities may unintentionally skew the efficient working of the market by inducing a library or school to choose a less efficient internal connection alternative.[36]

A careful reading of the Act supports this view. Section 254(h)(1)(B) provides, in pertinent part, that"

> (B) EDUCATIONAL PROVIDERS AND LIBRARIES. -- All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its ***services*** that are within the definition of universal service under subsection (c)(3), provide such ***services*** to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar ***services*** to other parties. The discount shall be an amount that the Commission with respect to interstate ***services***, and the States, with respect to intrastate ***services***, determine is appropriate and necessary to ensure affordable access to and use of such ***services*** by such entities. [Emphasis added.]

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[36] Separate Statement of Chong, at p. 5.

Thus, as Commissioner Chong notes, Section 254(h)(1) repeatedly refers to "services", and does not include products used in conjunction with those services.[37]

The definitions contained in the Act, although not very helpful in general, also do not include related products within the definitions applicable to this section. Specifically, Section 3(a)(51) states that:

> (51) TELECOMMUNICATIONS SERVICE. -- The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."

Today, when a customer purchases local exchange service from a telephone company, the telephone company does not wire the customer's premises as part of its provision of telephone service. The telephone wiring is installed in the premises during construction by the builder or a wiring contractor. The telephone company also does not provide the handset or other CPE as part of its telephone service; the customer may lease CPE from the telephone company, or most often provides its own CPE by purchasing or leasing it from another source. The "service" sold by the telephone company is access to a telephone network which allows the customer to contact any other customer on that network.

Section 254(c)(3) also does not support the inclusion of wiring within the definition of services for which schools and libraries may receive a discount. That section states that:

> (3) SPECIAL SERVICES. -- In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h). [Emphasis added.]

[37] Separate Statement of Chong, at pp. 6-8.

Again, this section makes no reference to including products that are related to providing, or even necessary in order to provide, telecommunications services which the Commission decides are appropriate to include within its definition of universal service -- the minimum basic services which it will require every telecommunications provider to provide to every customer who purchases telecommunications service.

The DCA parts ways with Commissioner Chong when she acknowledges that "Section 254(h)(2)(A) can be read to provide the Commission with discretion to fund internal connections."[38] That section provides that:

> (2) ADVANCED SERVICES. -- The Commission shall establish competitively neutral rules --
>
> (A) to enhance, to the extent technically feasible and economically reasonable, ***access to*** advanced telecommunications and information ***services*** for all public and non-profit elementary and secondary school classrooms, health care providers, and libraries; and
>
> (B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users. [Emphasis added.]

Once again, this section refers only to "services." The Act does not define "advanced telecommunications services." Therefore, one can only conclude that an "advanced telecommunications service" is intended to mean an advanced version of a currently available "telecommunications service" as that term is defined in Section 3(a)(51).

Nor does Section 3(a)'s definition of "information services" support to the Joint Board's recommendation. Section 3(a)(41) provides that:

> (41) INFORMATION SERVICE. -- The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving utilizing, or making available information via telecommunications, and includes electronic publishing, but

[38] Separate Statement of Chong, at p. 8.

> does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[39]

Although this definition refers to a "capability" rather than a "service," if one interprets it to include a product necessary to provide the capabilities its lists, then a computer, modem, and computer hardware and software, as well as wiring, also could be construed to be "capabilities" encompasses by this definition. Such a result would be absurd, particularly since there is no basis upon which the Commission could assert jurisdiction over computer and modem manufacturers.[40] Instead, one must look back to what is being defined -- information services -- and interpret the definition in that light.

The Joint Board argues that the installation and maintenance of inside wiring are services, and that they constitute the larger portion of the total cost of inside wiring; therefore, inside wiring is a "service" whose provision can be subsidized through the universal service program. In contrast, the DCA believes that even though wiring must be installed in order to be useful (as must computer hardware and software), wiring is itself a product, much like CPE, and not a service. This section makes no attempt to include within it hardware or connecting links which are useful or necessary in order to use the

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[39] Frankly, the DCA finds this definition virtually unintelligible.

[40] The DCA recognizes that "information services" also could be provided without a personal computer and modem -- i.e., using a TV, a new device which allows a consumer to access the Internet through a television set, and a modem owned by a cable TV provider (over whom the FCC has some jurisdiction) and housed on its premises. Were the FCC to require cable TV providers to offer discounts to schools and libraries for the device and modem necessary to provide "information services," it might constitute an impermissible regulation of America's competitive marketplace because it might effectively select one technology -- one means of obtaining information services -- over others; schools might be forced to purchase the discounted technology even in circumstances where the services available through that technology might not meet the school's particular needs as well as other technologies.

telecommunications services which schools and libraries may receive at discounted rates, and which must be installed and maintained at a cost.

Even assuming, arguendo, that the Joint Board's interpretation were correct, the fact remains that inside wiring is not regulated by the Commission. According to some commenters, the Commission has previously taken the position that wire inside the home or premises is "the property and responsibility of the property owner.[41] Moreover, as the Department of Justice maintained, and as Judge Greene ordered, the provision of inside wiring is a highly competitive market.

One commenter, Airtouch, has asserted that due to competitive forces, internal wiring is likely available at incremental cost today; therefore, it would be impossible to provide significant discounts for internal wiring without permitting discounts at less than its long run incremental cost. AirTouch contends that permitting services to be available to such low rates would heavily burden providers of support and, more important, would distort telecommunications markets.[42] Consumers usually are not benefited when markets are distorted, and for that reason, the DCA agrees with AirTouch.

Some commenters have asserted that including inside wiring in the definition of universal service would require all inside wire vendors to be subject to universal service obligations.[43] Such a broadening of the scope of contributors is logical and comports with the Joint Board's recommendation elsewhere in the Recommended Decision to require that providers who receive universal service funds contribute to universal service.

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[41] Recommended Decision, at ¶ 471.

[42] Recommended Decision, at ¶ 483.

[43] Recommended Decision, at ¶ 471.

Still other commenters have maintained that it would not be practical, given the regulatory and legal issues, to include inside wire vendors as participants in the universal service program.[44] The DCA agrees that it would be surprised if the participants in a highly competitive market were to welcome the opportunity to be highly regulated.

The DCA believes that it would be error for the Commission to interpret the Act -- a statute which was intended to deregulate the telecommunications market -- and turn it on its ear by interpreting it to give the Commission broader regulatory authority over services to which it heretofore had no authority to regulate.

Ultimately, the only basis upon which Section 254 could be interpreted to allow the Commission to required providers to offer discounts on inside wiring requires a misconstruction of the meaning of "access" in Section 254(h)(2)(A) -- the only basis upon which it also could be argued that the Commission has authority to order discounts for Internet services when it has no jurisdiction over either Internet services or Internet service providers. As will be discussed below with respect to the Joint Board's recommendation to subsidize the cost of an Internet access provider for schools and libraries, it would be wrong for the Commission to interpret a reference to "access" as Congress' grant of jurisdiction over inside wiring providers or Internet access providers.

The Commission is not a taxing agency. Those functions are well within the power of Congress, but not within the power of the Commission. Congress has not delegated to the Commission any of Congress' powers to levy taxes or appropriate tax revenues. If Congress had intended to do that, it would have done so explicitly. It did not.

The DCA recognizes that schools and libraries must have adequate wiring so that they

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[44] Recommended Decision, at ¶ 471.

can take full advantage of the new Information Age, just as they need classrooms and teachers. There is no doubt that Congress, if it desires, may appropriate funds for those purposes, and may direct the appropriate agency to take the steps necessary to accomplish that goal. It did not do so in the Act, whose principal goal is to open the telecommunications services industry to competition without impairing today's high telephone service penetration rate. If the Joint Board and the Commission are interested in seeing that goal accomplished, perhaps they, and all others who share that interest, should actively encourage Congress to take swift and appropriate action. However, irrespective of how worthy the cause and goal may be, it is not appropriate for the Commission to act assume regulatory authority, where none has been granted.

D. Subsidizing Internet Access Providers.

In its Recommended Decision, the Joint Board recognized that providers who are eligible to receive universal service funds should be required to participate in contributing support to the universal service program. That same reasoning should apply to Internet access service providers. If the Commission establishes a universal service program which allows Internet access service providers to receive universal service subsidy funds, then the Commission should first have the authority over Internet access services providers that would allow the Commission to require that those providers to contribute to the universal service program.

As emphasized in Section 254(h)(2)(A) quoted in the section above, Section 254(h)(2)(A) does not confer on the Commission jurisdiction over Internet access service providers. In fact, nowhere in the Act has Congress given the Commission jurisdiction over Internet service providers, and the DCA believes that none should be inferred. If Congress

should want to give the Commission jurisdiction over Internet service providers, it would specifically confer that authority.[45] It would be inappropriate and legally impermissible for the Commission to infer that authority.

The DCA disagrees with the Joint Board's statement in paragraph 460 that:

> Section 254(h)(2)(A) provides a broader framework for facilitating deployment of services to schools and libraries because the competitively neutral rules contemplated under that section are applicable to all service providers. [Footnote omitted.] The discounts mandated under section 254(h)(1)(B), in contrast, are limited to the provision of services by telecommunications carriers. [Footnote omitted.]

Both sections are quoted above. Section 254(h)(2)(A) make no reference to any type of telecommunications or information service provider or carrier. However, as the Joint Board admits, Section 254(h)(2)(B) -- the second half of a compound sentence -- clearly applies only to telecommunications carriers. Moreover, Section 254 falls within the Title I of the Act -- Telecommunications Services. It does not apply to Title II -- Broadcast Services, or Title III -- Cable Services. Although some telecommunications providers recently have begun to provide Internet services, nothing mandates that an Internet service provider must also be a telecommunications provider. In fact, most are not. There is no basis upon which to infer that Section (h)(2)(A) refers to all types of providers, be they providers of telecommunications services, information services, or any other types of services, but the remainder of Section 254 refers only to telecommunications providers. Such an interpretation strains the imagination.

Thus, when viewed in its totality, there is no logical basis upon which one could

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[45] The DCA notes that Internet service provision is not a natural monopoly, and there are no existing elements in the Internet service market which would support federal government intervention and regulation of that marketplace on that ground.

conclude that, by its reference to "access" to information services, Section 254(h)(2)(A) confers on the Commission jurisdiction over Internet service providers. Rather, Section 254, and all of Title I of the Act, apply only to telecommunications providers.

Nor does the Commission have jurisdiction over Internet services. Were Section 254(h)(2)(A) construed to confer on the Commission jurisdiction over Internet services provided by telecommunications providers, and if the Commission were to require telecommunications providers who offer Internet services provide those services to schools at deep discounts, then schools would have no choice but to purchase all of their Internet services from telecommunications providers; they could not afford to do otherwise. Such a result would not accord with the Act's objective to promote competitive markets, and would be a significant blow to the business of Internet service providers who are not also telecommunications providers. In fact, it might even destroy the non-telecommunications provider Internet service provider industry.

Thus, when one extends the impact of allowing the Commission to require discounts for Internet access to the results of the exercise of that power, surely no one could conclude that Congress intended by passing the Act -- whose purpose is to deregulate the telecommunications, broadcast and cable industries -- to give the Commission the power to so deeply intrude into and regulate new markets over which it has no express jurisdiction.

The Joint Board appears to conclude that the Commission may assume jurisdiction over Internet access on the basis that, "[a]ny attempt to disaggregate the network transmission component of Internet access from the information service component could serve to undermine the competitive forces that currently characterize the Internet access

market at this time."[46] The DCA believes that just the opposite is true. Failure to disaggregate the network transmission component of the Internet -- the component provided by telecommunications providers over whom the Commission has jurisdiction -- intrudes into a highly competitive, non-regulated market. Disaggregating the network transmission component of the Internet continues to regulate the telecommunications market, rather than deregulating it, but at least it does not effectively regulate a heretofore unregulated, and highly competitive market -- Internet access service provision.

Nor does the Joint Explanatory Statement provide any basis for the Joint Board's conclusion. In the Joint Explanatory Statement, Congress indicated its intent that the Commission provide discounts for the only portion of Internet services over which the Commission has jurisdiction -- "the ability to obtain access", i.e., the network transmission components. Congress stated, with respect to Section 254(h)(2), that:

> For example, the Commission could determine that telecommunications and information services that constitute universal service for classrooms and libraries shall include dedicated data links and the ability to obtain access to educational materials, research information, statistics, information on Government services, reports developed by Federal, State, and local governments, and information services which can be carried over the Internet.[47] [Emphasis added.]

There is a difference between access to the Internet and access to the ability to use the Internet. The former requires the use of an Internet service provider; the latter requires the lines and data links necessary to connect one to an Internet service provider. Congress must have understood that distinction. It is very important that Congress did not say that the

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[46] Recommended Decision, at ¶ 462.

[47] Joint Explanatory Statement, at p. 133. Emphasis added.

Commission could determine that universal service for schools and libraries shall include Internet access. Rather, Congress said it could include "the ability to obtain access". Moreover, its reference to "the ability to obtain access" is connected, without a comma, to another service Congress said the Commission could determine is part of universal service for schools and libraries -- dedicated data links, a network transmission component. A more logical reading of this statement is that Congress intended that the Commission could determine that telecommunications and information services that constitute universal service for schools and libraries could include dedicated data links and the other network transmission components within the Commission's jurisdiction that are necessary in order to obtain Internet access. The Commission should not rely on so thin a thread for a basis to infer a grant of jurisdiction over an industry over which the Commission would otherwise have no authority.

Once again, the DCA is sympathetic to the need for schools and libraries to obtain access to the Internet at rates they can afford. If Congress should decide to accomplish that goal, the decision doubtless will be clearly expressed, and the funding source (presumably general tax revenues) will doubtless be specified with great particularity. Congress did not do that in the Act, and the Commission should not use the thin threads asserted by the Joint Board as a basis for asserting jurisdiction in this area.

E. Use of Intrastate Revenues to Support the Federal Universal Service Program.

The DCA sympathizes with the Joint Board and the Commission with respect to its dilemma regarding whether to assess contributions to the federal universal service program on only interstate revenues, or also on intrastate revenues. The DCA recognizes that with the convergence of telecommunications providers and the services they offer, administering a

universal service program supported by a surcharge on only interstate revenues could become a nightmare. Moreover, such a support structure could result in gaming by providers -- providers might attempt to adjust their revenues in ways which would reduce the amount of support they would be required to contribute to the program.

Nonetheless, those difficulties cannot justify ignoring the clear state of the law on this issue. As Commissioner Laska Schoenfelder observed, "[t]he jurisdiction between the Commission and the states is distinct. The Commission possesses authority to assess interstate revenues, while the state commission have authority to utilize intrastate revenues."[48] Moreover, as Commissioner Kenneth McClure pointed out, "[c]ourts have required that regulatory agencies maintain jurisdictional distinctions when using carrier revenue to support the costs of a particular service."[49]

The DCA is not aware of any provision in the Act which explicitly negates that long-standing traditional jurisdictional separation. Section 254(d) states that:

> (d) TELECOMMUNICATIONS CARRIER CONTRIBUTION. -- Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other providers of interstate telecommunications may be required to contribute to the

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[48] Separate Statement of Commissioner Laska Schoenfelder Dissenting in Part ("Separate Statement of Schoenfelder"), November 7, 1996, at p. 1.

[49] Separate Statement of Commissioner Kenneth McClure Concurring in Part and Dissenting in Part ("Separate Statement of McClure"), at p. 2, citing AT&T Communications of the Mountain States, Inc. v. Public Services Commission, 625 F.Supp. 1204 (D.Wyo. 1985).

> preservation and advancement of universal service if the public interest so requires. [Emphasis added.]

Although this section allows the Commission to confer a limited exemption on providers whose contribution would be de minimis, this section goes out of its way to assure that the Commission can require absolutely any and all interstate telecommunications providers to contribute to the federal universal service program. This section clearly does not confer on the Commission the authority to require federal universal service contributions from intrastate providers. Thus, Section 254(d) is correctly interpreted to allow the Commission to require a contribution to the federal universal service program only from telecommunications providers who provide interstate services.

If that interpretation of Section 254(d) is extended, as the Joint Board does, to allow the Commission to assess that contribution based on both the interstate and the intrastate revenues of providers of interstate telecommunications service, the result would be that the intrastate revenues of telecommunications providers who provide both interstate and intrastate services would be assessed twice -- once for a contribute to the federal universal service program, and a second time for a contribution to the state universal service program. However, providers of only intrastate services would have to contribute only to the state universal service program. As Commissioner Schoenfelder noted, "such recovery is clearly discriminatory insofar as it assesses intrastate contributions only from those carriers that provide both interstate and intrastate services. Carriers providing intrastate services, but not interstate services, cannot be required to contribute under the Act, yet it is inconsistent and discriminatory to mandate the same revenues be recovered from carriers merely because they

provide interstate services."[50]

Most important is the effect the Joint Board's proposed interpretation of Section 254(d) would have on consumers. As Commissioner Chong so eloquently stated:

> *Let us make no mistake about who will foot the bill for this universal service program. It is not the telecommunications carriers, but the users of telecommunications services to whom these costs will be passed through in a competitive marketplace.*[51]

Almost all of the other commenting commissioners came to a similar conclusion.[52]

If the Commission adopts the Joint Board's recommendation and assesses a federal universal service contribution on both the interstate and intrastate revenues of interstate providers, then a consumer who chooses to purchase all of his or her telecommunications services from a provider who provides both interstate and intrastate services will pay more for those services than a consumer who chooses to purchase interstate telecommunications services from a provider who provides only interstate services, and to purchase intrastate telecommunications services from a provider who provides only intrastate services. Surely Congress never intended such an anti-consumer, anti-competitive, discriminatory result.

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[50] Separate Statement of Schoenfelder, at p. 2.

[51] Separate Statement of Chong, at pp. 12-13.

[52] See, Separate Statement of Ness, at p. 2 ("we were mindful that the funds for universal service ultimately come from consumers"); Separate Statement of Commissioner Julia Johnson and Chairman Sharon L. Nelson on Recommended Decision of the Federal-State Joint Board on Universal Service ("Separate Statement of Johnson and Nelson"), November 7, 1996, at p. ("As we all know, ratepayers are the ultimate supports of any program,"); Separate Statement of McClure, at p. 3 ("Arguably the end-user will be paying for these contributions through increased rates in order to make the telecommunications carrier whole."); and Separate Statement of Schoenfelder, at p. 2 ("Consumers are entitled to be made aware of the charges that they are paying to support the recommendations made herein.")

F. The Solution -- an All End User Surcharge.

Amazingly, the resolution of this complex problem is simple. The Commission should, as the California Public Utilities Commission ("CPUC") in its wisdom has done for the California state universal service program, adopt an all end user surcharge ("AEUS") funding mechanism.

Section 254(e) provides, in pertinent part, that "[a]ny such support should be explicit and sufficient to achieve the purposes of this section." Commissioner Ness noted that "[o]ur job is to construct a new universal service regime that makes subsidies more explicit, more targeted, more efficient, and more compatible with competition, . . ."[53] As Commissioner Schoenfelder acknowledged, the funding mechanism proposed by the Joint Board is not explicit.[54] The DCA applauds Commissioner Schoenfelder for her recognition that "[c]onsumers are entitled to be made aware of the charges that they are paying to support the recommendations made herein." Implicit subsidies -- those federal universal service subsidies that have existed until now -- are hidden; the ultimate payors are not aware that they are paying the subsidy. In contrast, an explicit subsidy is one which is apparent to the payor. Thus, an AEUS is an explicit subsidy.

While an assessment on the revenues of interstate telecommunications providers is not an internal cross-subsidy, it still is an implicit subsidy. The DCA agrees with the Citizens for a Sound Economy Foundation ("CSEF") that the Commission should adopt the principle that all subsidies should be direct and explicit, and that contributions should be clearly

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[53] Separate Statement of Ness, at p. 1. Emphasis added.

[54] "In closing, I would also like to express my reservations about not providing explicit notification on customers' bills about the charges assessed to fund these programs." Separate Statement of Schoenfelder, at p. 2.

specified and apparent to consumers.

Some argue that Section 254(d) precludes the use of an AEUS. That argument requires a perverse interpretation of that portion of Section 254(d) which states that:

> Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. [Emphasis added.]

Using the funding mechanism proposed by the Joint Board, telecommunications providers pay federal universal service contributions to the Commission, and, as most of the commenting Commissioners have admitted, those telecommunications providers will impose charges on their customers sufficient to cover the contributions they make to the universal service program. Thus, using that funding mechanism, while providers rather than consumers pay money directly to the Commission, the fund which support universal service ultimately come from consumers, not from providers.

Using an AEUS funding mechanism, a provider collects from each of its customer a percentage of that customer's total telecommunications bill as that customer's share of support for the federal universal service program. The provider then aggregates those funds collected, and pays them directly to the Commission.

Thus, in the first instance, the provider pays the Commission, and then collects from customers; in the second instance, the provider collects from its customers, and then pays the Commission. The end result is the same -- consumers pay the cost. So what is the difference? The difference -- and a very important one -- is that in the first instance the paying customer never knows that he or she is contributing to the federal universal service fund, and the subsidized customer never knows that other customers are paying part of the

cost of his or her service;[55] in the second instance, the paying customer knows not only that he or she is contributing to the federal universal service fund, but also how much he or she is contributing, and the receiving customer knows both that there is a subsidy and the amount.

The DCA realizes that some people believe that an AEUS is not a politically palatable funding mechanism -- that it is better not to inform consumers about such matters. Yet, the DCA believes that there is no question that the AEUS is most fair and just to consumers. Consumers have a right to know what they are paying to support universal service, and it is equally important that consumers know when they are the beneficiaries of support that is provided by others. The DCA urges the Commission to take the high road, albeit perhaps a more difficult path, and give both the paying and receiving consumers the information they need and deserve regarding the federal universal service program.

G. Lifeline.

The DCA generally supports the Joint Board's recommendations with respect to the Lifeline program. However, the DCA is concerned about three of the Joint Board's recommendations that: (1) voluntary toll limitation or toll blocking should be provided free to all low-income consumers; (2) carriers who receive universal service support for providing Lifeline service be precluded from disconnecting Lifeline service for non-payment of toll charges; and, (3) telecommunications providers be prohibited from charging service deposits to Lifeline customers who elect to receive toll blocking.

The DCA strongly supports a policy which encourages providers to offer toll

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[55] In fact, there is nothing which would preclude providers from using their required contribution to the federal universal service program as an excuse to increase rates far more than necessary to cover that assessment. How would consumers ever know?

limitation and/or toll blocking. The DCA also strongly supports a policy which provides a discounted deposit for low-income customers. Both policies have been adopted by the California Public Utilities Commission in its recent universal service rulemaking decision, and both telecommunications providers and consumers are generally pleased with the result. However, the DCA is wary of a policy which mandates the provision, for free, of something that has a cost, particularly when the burden is placed on other consumers. Moreover, requiring that people pay something of value for what they receive, even if it is not the full cost of the product or service, enhances their self-esteem and encourages them to value what they receive. The distinction is the difference between giving a hand out, or lending a helping hand.

The DCA notes that the Joint Board declined to require a 100 percent discount to the most economically disadvantaged schools and libraries, on the basis that if the schools and libraries have to pay something for the service, that payment will be an incentive for them to maximize the cost-effective and efficient use of the services. Those who get a service free are less likely to be prudent managers of it.[56] It should apply the same principle for Lifeline.

The toll limitation which the Joint Board proposes to include as part of the basic service for Lifeline customers is voluntary. That means that customers who do not wish to subscribe to toll limitation/toll blocking are under no obligation to do so. If the Lifeline customer elects not to use toll limitation/roll blocking, the amount of unpaid toll charges he or she could incur without risk of telephone service disconnection would be unlimited. Nonetheless, the Joint Board recommends that providers who receive universal service

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[56] Recommended Decision, at ¶¶ 549, 551.

support for providing Lifeline service be precluded from disconnecting Lifeline service for non-payment of toll charges. Precluding all disconnection for Lifeline customers on the basis of non-payment of toll charges will doubtless generate losses that all other bill-paying customers will bear.

To the extent that a customer elects toll limitation, as DCA understands it, it is the customer, not the telecommunications provider or the Commission, who will set the limit of the monthly toll charges the customer will be able to incur. Thus, under the Joint Board's proposal, it appears that a customer could incur substantial toll charges that remain unpaid indefinitely without any threat of telephone service disconnection. Such a program would provide Lifeline customers with undue advantage vis-a-vie other consumers, and would generate needless losses which other people would be forced to bear.

The same argument relating to offering free toll limitation/toll blocking applies to prohibiting providers from charging a deposit to initiate service to Lifeline customers. If the provider charges a deposit to initiate service to all other customers, the DCA would not encourage a policy which completely eliminates that charge for Lifeline customers.[57] The DCA would, however, support a moderate, regulatorily established, initiation of service deposit for Lifeline customers. A system to transfer that deposit from one provider to another if the customer moves from one service territory to another may be another way to assist those who move frequently and find it difficult to come up with a new deposit each time.

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[57] It is entirely possible that as competition in the local exchange market develops, competition force providers to significantly reduce or eliminate a deposit requirement. The DCA urges the FCC to allow the marketplace to work in a competitive manner, and not to regulate the marketplace where the need for regulation is questionable.

III. CONCLUSION.

A. Competition Supports Universal Service Goals.

In this new telecommunications and information age, the Commission's chief role is to shepherd the telecommunications industry into a competitive mode, so that California does not lag behind the rest of the nation and world. A competitive market in telecommunications services will drive down costs and prices more quickly and forcefully than any regulatory agency will be able to do. Witness the steady decline in the prices of VCRs, CD players and other products and services offered by the competitive market in consumer electronics products. It follows that the cross-subsidies to universal service beneficiaries must be carefully designed, circumscribed and focused, so that the U.S. will both keep basic telecommunications services affordable and enjoy the fruits of competition.

While competition alone may not fully achieve the goals of universal service, competition supports those goals, and it is not inherently antagonistic to them. Since a true competitive market will drive down prices, and since providers in a competitive market have incentives to adopt pricing policies that support universal service, it follows that a course most suitable for everyone would be to foster a transition to a true competitive market where prices are as closely related to costs as the providers in that market desire. The result will be to minimize the need to rely on cross-subsidies or other forms of support to achieve universal service goals.

B. Joint Board's Recommendations.

In adopting a universal service principle of competitive neutrality, the DCA urges the Commission to apply a focus of "consumer competitive neutrality." While the DCA supports limiting universal service support to a single primary residential connection, the DCA urges

the Commission to even more narrowly focus the subsidies on those who truly need economic assistance in order to remain connected to the network.

As laudable as the goals to wire schools and libraries and provide them with Internet access are, the Act does not confer on the Commission the jurisdiction necessary to implement the Joint Board's recommendations on those issues.

Rather than adopt the Joint Board's competitively discriminatory recommendation to assess a surcharge on the intrastate revenues of only those interstate telecommunications providers over which the Commission has jurisdiction, or the administrative nightmare of separating their interstate and intrastate revenues, the DCA recommends a competitively neutral all end user surcharge funding mechanism that provide consumers with information necessary for them to assess the value and benefits of the universal service program.

While the DCA supports encouraging providers to provide toll limitation and toll blocking to Lifeline customers, requiring provision of those services at no cost will impose added costs on the customers who pay for the Lifeline subsidy. Prohibiting providers from disconnecting Lifeline customer for non-payment of toll charges may be inappropriate, particularly where the customer can select the toll limitation amount. While a reduced connection deposit may be appropriate, prohibiting the collection of <u>any</u> deposit from Lifeline